

DEPARTMENT OF STATE REVENUE

04-20140026.LOF

Letter of Findings Number: 04-20140026
Sales/Use Tax
For Tax Years 2010, 2011, and 2012

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Retail merchant was required to pay sales/use tax for a passenger vehicle, various trucks, equipment, parts and consumables it purchased and used for its street sweeping and snow removal services and in its business activities. Retailer merchant was also responsible for the statutory interest and negligence penalty.

ISSUES**I. Use Tax - Imposition.**

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-4-1; IC § 6-2.5-5-8; IC § 6-8.1-5-1; IC § 6-8.1-5-4; Indiana Dep't. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); Indiana Dep't of State Revenue v. Caterpillar, Inc., 15 N.E.2d 579 (Ind. 2014); Rhoads v. Indiana Dep't of State Revenue, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); USAir, Inc. v. Indiana Dep't of State Revenue, 623 N.E.2d 466 (Ind. Tax Ct. 1993); Monarch Beverage Co. Inc. v. Indiana Dep't of State Revenue, 589 N.E.2d 1209 (Ind. Tax Ct. 1992); Hyatt Corp. v. Dep't of State Revenue, 695 N.E.2d 1051 (Ind. Tax Ct. 1998); Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974); Indiana Dep't of State Revenue v. Kimball Int'l Inc., 520 N.E.2d 454 (Ind. Ct. App. 1988); [45 IAC 2.2-3-4](#); [45 IAC 2.2-4-27](#); [45 IAC 2.2-5-3](#); [45 IAC 2.2-5-6](#); [45 IAC 2.2-5-8](#); [45 IAC 2.2-5-9](#); [45 IAC 2.2-5-10](#); [45 IAC 2.2-5-15](#).

Taxpayer protests the Department's proposed assessments on its purchases of tangible personal property, claiming its purchases were sold or leased to out-of-state customers.

II. Tax Administration - Interest and Negligence Penalty.

Authority: IC § 6-8.1-3-17; IC § 6-8.1-5-2; IC § 6-8.1-10-1; IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the interest and negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana company which sells and rents sweeper trucks, flusher trucks, and parts to others. Taxpayer also provides street and plant sweeping and snow removal services. In performing the sweeping and snow removal services, Taxpayer occasionally subcontracted third parties and shared the profits. In 2013, the Indiana Department of Revenue ("Department") conducted a sales/use tax audit for the 2010, 2011, and 2012 tax years. The audit found that Taxpayer failed to collect and remit sales tax on various items it sold. The audit also found that Taxpayer purchased various items and used them either in performing sweeping and snow removal services or in its business activities without paying sales/use tax. Those items include trucks, a street sweeper, an Audi passenger vehicle, parts, and consumables, such as oil, nuts, and bolts ("Items at Issue"). As a result, the Department assessed additional sales/use tax, penalty, and interest for the tax years at issue.

Taxpayer protested the assessment of additional tax on the Items at Issue. An administrative phone hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Use Tax - Imposition.

DISCUSSION

A. Audit Results.

The audit found that Taxpayer purchased Items at Issue and used them either in performing sweeping and snow removal services or in its business activities without paying sales tax or use tax. The audit, in relevant part, stated:

Trucks, skid steer loaders and plow equipment were purchased by the taxpayer. The taxpayer provides the equipment to a subcontractor. The subcontractor provides the labor to plow parking lots. **There is no rental agreement for this equipment between the subcontractor and the taxpayer. There are also no sales invoices or payments made to the taxpayer from the subcontractor.** The taxpayer stated that at the end of each year profit and loss statements of the subcontractor and [the taxpayer] are used to determine monies earned on snowplowing and that no rental contract was available. . . .

The taxpayer purchased an Audi passenger vehicle from an Indiana dealership without paying Indiana sales tax. The taxpayer registered the vehicle in Indiana and use tax was not paid at the [Indiana] Bureau of Motor Vehicles. **The taxpayer stated that this vehicle was given to [a third party] in lieu of commission earned.** When initially asked, the taxpayer indicated that there was no rental agreement. **In a later meeting which was attended by the field audit supervisor he stated he could get one drawn up.** The taxpayer is not in the business of renting automobiles.

(Emphasis added).

The audit also found that Taxpayer failed to maintain adequate records, including source documents, such as invoices. The audit thus assessed additional use tax on those purchases because Taxpayer failed to show that those purchases were exempt from sales/use tax.

B. Taxpayer's Response.

Taxpayer protested the assessment of addition sales/use tax on the Items at Issue. Taxpayer essentially argued that it purchased the Items at Issue to resell or lease to others. In addition to Excel spreadsheets, Taxpayer submitted an "Agreement," an "Equipment Lease," a "Purchase Order" from one out-of-state customer and a letter to that customer to support its protest.

C. Hearing Analysis.

The issue in this case is whether Taxpayer's documentation sufficiently demonstrated that it was not responsible for the additional tax on various purchases because these purchases were exempt from Indiana sales/use tax.

As a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012). Thus, the taxpayer is required to provide documentation explaining and supporting its challenge that the Department's assessment is wrong. Poorly developed and non-cogent arguments are subject to waiver. Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012). Also, "all statutes are presumptively constitutional." Indiana Dep't of State Rev. v. Caterpillar, Inc., 15 N.E.3d 579, 587 (Ind. 2014) (citing UACC Midwest, Inc. v. Indiana Dep't of State Rev. 629 N.E.2d 1295, 1299 (Ind. Tax Ct. 1994)). When an agency is charged with enforcing a statute, the courts defer to the agency's reasonable interpretation of that statute "over an equally reasonable interpretation by another party." Caterpillar, Inc., 15 N.E.3d at 583.

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). A person who acquires property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). Indiana also imposes a complementary excise tax called "the use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). The use tax is also imposed on the purchase of a vehicle, if the vehicle "is acquired in a transaction that is an isolated or occasional sale" and "is required to be titled, licensed, or registered by this state for use in Indiana." IC § 6-2.5-3-2(b). "Use" means the "exercise of any right or power of ownership

over tangible personal property." IC § 6-2.5-3-1(a). The use tax is functionally equivalent to the sales tax. See *Rhoades v. Indiana Dep't of State Revenue*, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002).

By complementing the sales tax, the use tax ensures that non-exempt retail transactions (particularly out-of-state retail transactions) that escape sales tax liability are nevertheless taxed. *Rhoades*, 774 N.E.2d at 1048; *USAir, Inc. v. Indiana Dep't of State Revenue*, 623 N.E.2d 466, 468 - 69 (Ind. Tax Ct. 1993). The use tax ensures that, after such goods arrive in Indiana, the retail purchasers of the goods bear their fair share of the tax burden. *Rhoades*, 774 N.E.2d at 1047 - 1050 (explaining that, generally, states impose a use tax to prevent the erosion of the state's tax base when its residents make purchases in other states). To trigger imposition of Indiana's use tax, tangible personal property must (as a threshold matter) be acquired in a retail transaction. IC § 6-2.5-3-2(a); *USAir, Inc.*, 623 N.E.2d at 468. A taxable retail transaction occurs when (1) a party acquires tangible personal property as part of its ordinary business for the purpose of reselling the property; (2) that property is then exchanged between parties for consideration; and (3) the property is used in Indiana. See IC § 6-2.5-1-2; IC § 6-2.5-4-1(b) and (c); IC § 6-2.5-3-2(a) and (b).

In *Monarch Beverage Co. Inc. v. Indiana Dep't of State Revenue*, 589 N.E.2d 1209 (Ind. Tax Ct. 1992), the taxpayer, Monarch Beverage Co. Inc. ("Monarch"), which was in the business of distributing beverages, purchased 16 trailers from the truck/trailer manufacturer. *Id.* at 1210. After receiving the trailers along with the certificates of origin and invoices for each trailer, Monarch paid the tax to the Indiana Bureau of Motor Vehicles ("BMV") to obtain the license plates and title of the trailers. *Id.* Subsequently, Monarch transferred the ownership and title of those trailers to a third-party pursuant to a lease arrangement and paid the sales tax on the lease. *Id.* Monarch then filed a claim for refund on the tax it paid to the BMV. The Department denied Monarch's refund claim and Monarch challenged the refund denial. *Id.*

Ruling in favor of the Department, the Tax Court stated that Monarch's acquisition of the trailers was a taxable retail transaction because the manufacturer was a retail merchant making retail transactions. *Id.* at 1211. The Tax Court determined that the manufacturer "is engaged in 'selling at retail,' as defined in IC [§] 6-2.5-4-1, because (1) it acquired parts for the purpose of resale as manufactured trailers and (2) it transferred to Monarch possession of and title to the trailers in exchange for consideration." *Id.* at 1214. (Emphasis in original).

The Tax Court further explained:

Sales and use taxes are transactional taxes imposed on the gross income received from a retail transaction. Therefore, sales or use tax can be collected more than once on the same item if the item is the subject of more than one non-exempt retail transaction.

Furthermore, the Legislature intended sales and use taxes as end use taxes imposed on ultimate user/consumers, indicated by providing exemptions that prevent tax pyramiding, i.e., taxing items sold during the intermediate stages of production, prior to completion of the end product:

'All sales tax laws exempt or exclude some retail sales. The reasons for this treatment vary. Goods used in the manufacturing process are exempt entirely or partially by all state laws to avoid tax pyramiding, that is, the situation where a tax is levied on a tax and the result is a retail price increase greater than the amount of the tax.'

Id. (Internal citations omitted).

The Tax Court opined that although Monarch paid tax to the BMV on its purchase of the trailer and also "paid the same tax on the trailers a second time under the lease agreement," they are two distinct and separate taxable events (transactions). *Id.* at 1214-15. "Monarch's intent to create only one taxable transaction does not alter these facts." *Id.* The Tax Court concluded that "Monarch is the ultimate user/consumer of the trailers. Taxing the finished trailers more than once therefore does not offend the legislature's policy against pyramiding." *Id.*

Accordingly, as a general rule, all purchases of tangible personal property are taxable unless specifically exempt by statutes or regulations. [45 IAC 2.2-5-3\(b\)](#); [45 IAC 2.2-5-6\(a\)](#); [45 IAC 2.2-5-8\(a\)](#); [45 IAC 2.2-5-9\(a\)](#); [45 IAC 2.2-5-10\(a\)](#). An exemption from the use tax is granted for transactions where the sales tax was paid at the time of purchase pursuant to IC § 6-2.5-3-4 and [45 IAC 2.2-3-4](#). There are various tax exemptions available outlined in IC § 6-2.5-5. The legislature enacted the statutory exemptions, such as IC § 6-2.5-5-8, "to mitigate the effect of tax pyramiding." *Hyatt Corp. v. Dep't of State Revenue*, 695 N.E.2d 1051, 1056 (Ind. Tax Ct. 1998). "Tax pyramiding occurs in the sales and use tax context where a tax is levied upon a tax." *Id.* A statute which provides a tax exemption, however, is strictly construed against the taxpayer. *Indiana Dep't. of State Revenue, Sales Tax*

Division v. RCA Corp., 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). "[W]here such an exemption is claimed, the party claiming the same must show a case, by sufficient evidence, which is clearly within the exact letter of the law." Id. at 101 (internal citations omitted). In applying any tax exemption, the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." Indiana Dep't of State Revenue v. Kimball Int'l Inc., 520 N.E.2d 454, 456 (Ind. Ct. App. 1988).

Taxpayer in this case argued that its purchases were not subject to sales/use tax because it either resold or leased the items it purchased. The relevant statute states that "[t]ransactions involving tangible personal property other than a new motor vehicle are exempt from the state gross retail tax if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of the person's business without changing the form of the property." IC § 6-2.5-5-8.

[45 IAC 2.2-5-15](#) further explains:

- (a) The state gross retail tax shall not apply to sales of any tangible personal property to a purchaser who purchases the same for the purpose of reselling, renting or leasing, in the regular course of the purchaser's business, such tangible personal property in the form in which it is sold to such purchaser.
- (b) General rule. Sales of tangible personal property for resale, rental or leasing are exempt from tax **if all of the following conditions are satisfied:**
 - (1) The tangible personal property is sold to a purchaser who purchases this property to resell, rent or lease it;**
 - (2) The purchaser is occupationally engaged in reselling, renting or leasing such property in the regular course of his business; and**
 - (3) The property is resold, rented or leased in the same form in which it was purchased.**
- (c) Application of general rule.
 - (1) The tangible personal property must be sold to a purchaser who makes the purchase with the intention of reselling, renting or leasing the property. **This exemption does not apply to purchasers who intend to consume or use the property or add value to the property through the rendition of services or performance of work with respect to such property.**
 - (2) The purchaser must be **occupationally engaged in reselling**, renting or leasing such property in the regular course of his business. **Occasional sales and sales by servicemen in the course of rendering services shall be conclusive evidence that the purchaser is not occupationally engaged in reselling the purchased property in the regular course of his business.**
 - (3) The property must be resold, rented or leased **in the same form in which it was purchased.**

(Emphasis added).

Thus, to claim the above mentioned exemption, a taxpayer must demonstrate (1) that it purchases the items with an intention to resell the items; (2) that it is occupationally engaged in reselling the items in the regular course of its business; and (3) that the items purchased are resold in the same form in which they were purchased. The taxpayer is not entitled to the exemption when it is not occupationally engaged in reselling the items purchased; nor is the taxpayer entitled to the exemption when it purchases the items and uses them. Additionally, when the items are resold, unless purchasers qualify for exemptions, the taxpayer is responsible for collecting the sales tax at the time of the transaction as "a separate added amount to the consideration in the transaction." IC § 6-2.5-2-1(b).

Taxpayer in this instance claimed that its purchases of Items at Issue were not subject to tax because they were resold (or leased) to others. However, upon review, Taxpayer's reliance on its supporting documentation is misplaced. First, Taxpayer is required to "keep books and records so that the [D]epartment can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records . . . include all source documents necessary to determine the tax, including invoices . . . receipts, and canceled checks." IC § 6-8.1-5-4(a). Taxpayer's spreadsheets are neither source documents nor verifiable records.

Similarly, the "Agreement" and the "Equipment Lease" provided by Taxpayer alone without the source documents, such as invoices or receipts of payments, were not verifiable records. Specifically, during the audit process the Department inquired, but Taxpayer provided neither signed agreements nor invoices pertaining to the transactions in question for those tax years. Rather, Taxpayer offered the agreements only after the audit was

concluded; the agreements were not dated when parties signed. Additionally, the item at issue in the "Equipment Lease" was an Audi passenger vehicle which Taxpayer was not occupationally engaged in leasing passenger vehicles and which Taxpayer offered no explanations that the Audi passenger vehicle is a piece of "Equipment" for lease. Even if, assuming that the agreements were properly executed, Taxpayer provided no verifiable records to demonstrate that it indeed purchased the items to resell or lease to others. Taxpayer, as the audit noted, did not invoice and the lessees did not pay pursuant to their "Lease" agreements, if any. In other words, Taxpayer's supporting documentation failed to show (1) that it purchases the items with an intention to resell/lease the items; (2) that it is occupationally engaged in reselling/leasing the items in the regular course of its business; and (3) that the items purchased are resold/leased in the same form in which they were purchased.

Finally, Taxpayer pointed to its December 16, 2010, letter to an out-of-state customer and that customer's purchase order to support its assertion that its purchase of "Galaxy R-3 street sweeper JALE5W169A7900917" was exempt because the item was rented to that customer. However, upon review, Taxpayer is mistaken. First, both documents failed to demonstrate that both parties intended to enter into leasing the "Galaxy R-3 street sweeper JALE5W169A7900917." The purchase order further showed that the customer engaged Taxpayer as "CONTRACTOR TO PROVIDE LABOR [and] EQUIPMENT TO COMPLETE . . . ROADWAY SWEEPING, PLOWING SNOW AND APPLYING SALT, . . . LABOR [and] SWEEPER TRUCK (INCLUDE FUEL) . . ." See [45 IAC 2.2-4-27\(d\)\(3\)\(B\)](#) (explaining that "[t]he rental of tangible personal property together with an operator as part of a contract to perform a specific job in a manner to be determined by the owner of the property or the operator shall be considered the performance of a service rather than a rental or lease provided the lessee cannot exercise control over such property and operator"). The documents thus demonstrated, to the contrary, that Taxpayer was acting as a service provider and used the street sweeper to perform the street and plant sweeping and snow removal services. Given the totality of the circumstances, in the absence of other supporting documentation, the audit correctly concluded that Taxpayer was the user of the Galaxy R-3 street sweeper; its purchase of the Galaxy R-3 street sweeper was subject to sales/use tax. Since Taxpayer did not pay sales tax at the time of the purchase, the use tax is properly assessed.

In short, the Department is not able to agree that Taxpayer's purchases were exempt because Taxpayer failed to provide verifiable records to support its assertion that the Items at Issue were exempt.

FINDING

Taxpayer's protest is respectfully denied.

II. Tax Administration - Interest and Negligence Penalty.

DISCUSSION

Taxpayer requested that the Department abate the statutory interest. However, pursuant to IC § 6-8.1-10-1(e), the Department is only permitted to waive the interest under IC § 6-8.1-3-17(c) and IC § 6-8.1-5-2. Taxpayer provided no documentation to support its request for the waiver. Thus, the Department does not have the authority to waive the interest imposed.

Taxpayer also requested that the Department abate the negligence penalty. The Department may assess a negligence penalty if the taxpayer "(2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment; (3) incurs, upon examination by the department, a deficiency that is due to negligence; [or] (4) fails to timely remit any tax held in trust for the state" IC § 6-8.1-10-2.1(a).

[45 IAC 15-11-2\(b\)](#) further states:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive a negligence penalty when "the taxpayer affirmatively establishes that the failure . . . was due to reasonable cause and not due to negligence." [45 IAC 15-11-2\(c\)](#). The taxpayer "must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the

penalty imposed under this section." Id. The Department is mindful that "[r]easonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case."

In this instance, Taxpayer did not provide documents to affirmatively establish that its failure to pay tax was not due to negligence.

FINDING

Taxpayer's protest of the imposition of statutory interest and negligence penalty is denied.

SUMMARY

For the reasons discussed above, Taxpayer's protest of the Department's proposed assessment of additional sales/use tax is denied. Taxpayer's protest of the statutory interest and the negligence penalty is also respectfully denied.

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